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No. 83-638

In The

Supreme Court of the United States

October Term, 1983

ALCAN ALUMINIUM LIMITED,

Plaintiff, Appellant and Petitioner,

vs.

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Operating Through Its New York Office; FRANK GOODMAN, Individually, and as District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, Individually, and as Supervisor-Audit Group, New York Office of the Franchise Tax Board of the State of California,

Defendants, Appellees and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has standing under article III of the Constitution to bring this action.

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No. 83-638

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ALCAN ALUMINIUM LIMITED,

Plaintiff, Appellant and Petitioner,

vs.

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Operating Through Its New York Office; FRANK GOODMAN, Individually, and as District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, Individually, and as Supervisor-Audit Group, New York Office of the Franchise Tax Board of the State of California,

Defendants, Appellees and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

JURISDICTION

The technical jurisdictional requirements appear to be set forth adequately in the petition except that petitioner has failed to establish its standing to sue. It also should be observed that contentions similar to petitioner's were rejected by the United States District Court for the Northern District of California and affirmed by the United States Court of Appeals for the Ninth Circuit in *Shell Petroleum N. V. v. Graves* (1983), 709 F. 2d 593, based

upon and in conformity with the pertinent decisions of this Court and the federal courts.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, article III, section 3 (standing of plaintiff).

STATEMENT OF THE CASE

A. Prefatory Statement

In its extensive statement of the case, petitioner has failed to point out a crucial fact, namely, that petitioner's wholly owned California subsidiary (Alcan Aluminium Corporation, hereafter referred to as "ALCANCORP") has filed in the California Superior Court a suit for refund of the same taxes which petitioner is attacking in this action. The California action is pending before the California court at this very moment. A decision favorable to ALCANCORP in that case will avoid the constitutional questions raised here by petitioner.

B. Facts

Since petitioner has set forth some of the facts in an argumentative rather than factual context and since its recitation of the facts is incomplete, we will restate the principal facts.

1. *Background Facts*

a. Petitioner is a Canadian corporation which does no business in the United States and has paid no taxes to the State of California.

b. Petitioner is the parent of ALCANCORP, which does business in the United States, including California.

c. Respondents, hereafter referred to collectively as FTB, is the agency of the State of California administering the income and franchise tax laws of that state.

d. Petitioner and ALCANCORP are two completely separate and independent legal entities.

e. FTB has not or even attempted to tax petitioner; nor has the FTB taken or even sought to take any action of any type whatsoever against petitioner.

f. State of California, through the FTB, assessed additional franchise taxes based on the unitary method upon ALCANCORP.

g. The United States Supreme Court has consistently held that the states may impose an apportioned tax on the unitary method upon the income of a corporation doing business in more than one state or nation. (*Container Corporation of America v. Franchise Tax Board* (1983) — U. S. — [77 L. Ed. 2d 545, 103 S. Ct. 2933].)

h. On or about April 14, 1977, ALCANCORP filed in the Los Angeles County Superior Court (California) a suit against the FTB for refund of taxes assessed against ALCANCORP on the unitary method. The suit

is known as *Alcan Aluminium Corporation v. Franchise Tax Board,* Los Angeles Superior Court No. C 196604. This case is still pending, having been held in abeyance awaiting the outcome of the *Container* decision.

2. *Relief Sought In Instant Lawsuit*

On June 25, 1981, petitioner filed this action in the federal district court seeking a variety of relief; namely,

a. First Claim—Appears to seek injunctive relief.

b. Second Claim—Seeks a declaration that the application of the unitary method of taxation upon ALCANCORP is unlawful and it violates the constitution, laws and treaties of the United States.

c. Third Claim—Appears to request that a refund be made to petitioner of taxes that had been paid by ALCANCORP.

d. Fourth Claim—Appears to claim that taxation of ALCANCORP has resulted in petitioner being deprived of its property without due process.

e. Special Claim—Seeks payment of attorney's fees under 42 United States Code section 1988.

3. *Position Taken In The Court of Appeals*

Petitioner conceded the constitutionality of the unitary method of taxing domestic corporations. Petitioner went on to state that it "makes no claim, for instance, that principles of interstate commerce are violated by apportioning income from other states, or that appellees' manner of calculating the apportioned income violates prin-

ciples of due process." (Petitioner's App. Br., Court of Appeals, p. 8.)

Petitioner further asserted that "this Court is asked to make a determination as to whether, under the distinct circumstances of the instant case, the assessment of the tax [against ALCANCORP] is constitutional." (*Id.*, at p. 17.)

Petitioner also referred to some government correspondence from the prior federal administration and the compilation of various statistics (*id.* at pp. 17-18) and stated that "[T]he conclusion that appellees' taxing scheme burdens foreign commerce, and therefore, burdens appellant's activities exclusively in foreign commerce is inescapable and this Court should squarely hold that appellees' tax is an unconstitutional tax burden on appellant's activities in foreign commerce, and appellant therefore has standing to challenge appellees [sic] unitary tax measure." (*Id.* at p. 29.)

ARGUMENT

I.

Petitioner Has No Standing Under Article III of the United States Constitution

A. Introduction

The essence of petitioner's action is found in its allegation that the FTB has unlawfully sought to assess additional taxes against ALCANCORP on the unitary method.

Petitioner does not quarrel with FTB's requiring ALCANCORP to file a combined report on a military basis with respect to ALCANCORP and its United States subsidiaries. But in an effort to prevent FTB from lawfully including the unitary portion of petitioner's income and factors in the tax formula to determine the amount of ALCANCORP's income which is properly apportionable to California under the unitary method, petitioner filed the instant action for injunctive and declaratory relief prior to ALCANCORP's proceeding with its California suit for refund.

B. In Container This Court Does Not State That A Nontaxpaying Foreign Parent Has Standing To Challenge California's Tax

In *Container*, this Court clearly did not state that a nontaxpaying foreign parent has standing to challenge a state's tax imposed on a foreign parent's United States subsidiary. However, petitioner relies on two statements that this Court made in *Container* to support its strained contention for standing. In the first of these two, this Court said in a note that:

> "We have no need to address in this opinion the constitutionality of combined apportionment with respect to state taxation of domestic corporations with foreign parents. . . ." (*Container*, 103 S. Ct. at 2952, n. 26.)

This statement refers to the state taxation of domestic corporations with a foreign parent. ALCANCORP, which falls in this category, can have the issue decided in its California state court lawsuit. Obviously the only proper procedure is for ALCANCORP to proceed with its state

remedies rather than to have petitioner proceed in the federal court in behalf of ALCANCORP.

In the second note in *Container* upon which petitioner relies, this Court said:

> "We recognize that the fact that the legal incidence of a tax falls on a corporation whose formal corporate domicile is domestic might be less significant in the case of a domestic corporation that was owned by foreign interests. We need not decide here whether such a case would require us to alter our analysis." (103 S. Ct. at 2956, n. 32.)

This note does not state that a foreign, nontaxpaying parent has standing in federal court to challenge a state tax on its United States subsidiary. Nor is there any such pronouncement in the body of the *Container* decision itself. But that is precisely what petitioner argues.

C. The Undisputed Facts Unequivocally Demonstrate That Petitioner Has No Standing To Sue

On the basis of the undisputed facts, it is clear that petitioner has no standing to sue. The FTB has not assessed or sought to assess any tax against petitioner, nor has it sought to take any action against petitioner, which is a foreign corporation that does no business in the United States and is not a California taxpayer.

The tax in question has been imposed by FTB upon ALCANCORP, petitioner's California subsidiary. The amount of the tax is based on a formula, popularly known as formula apportionment, which includes the income and factors of all companies that are in the unitary group, including the foreign parent if it is factually includable in

the group. In this case, if the legality of the amount of the tax imposed is incorrect, ALCANCORP can so prove it in its California lawsuit. In fact, if FTB's errors are patently obvious as petitioner contends they are,[1] then it would be a very simple matter for ALCANCORP to present that evidence to the California court. After all, there is no suggestion that the California courts would not be capable of understanding or following the laws of the nation as interpreted by this Court.

Petitioner is separate and independent from ALCANCORP, the corporation against which the FTB assessed the tax. Petitioner occupies the status of a shareholder of ALCANCORP. Obviously as a shareholder, petitioner has no inherent right to receive anything from ALCANCORP. It certainly does not have the right to receive monthly, quarterly, or annual or any other form of dividend. In fact, as a shareholder of ALANCORP, petitioner owns neither the corporate property nor the corporate earnings of ALCANCORP; it simply has an expectancy in each. This well-established proposition was stated by this Court in these words:

> "The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the cor-

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[1]Petitioner argued before the court below that the obvious errors were shown in ten pages of its appellate brief. (Petitioner's App. Br., pp. 17-29.)

porate property." (*Rhode Island Hospital Trust Co. v. Doughton* (1926) 270 U. S. 69, 81.)

Moreover, it is well established that although an injury to a corporation may indirectly harm a shareholder by decreasing the value of his shares, that fact does not give the shareholder standing to sue on his own behalf. The primary injury and the primary right to sue are the corporation's; the shareholder may sue, if at all, only in a proper derivative action. (*Von Brimer v. Whirlpool Corp.* (9th Cir. 1976) 536 F. 2d 838, 846; *Erlich v. Glasner* (9th Cir. 1969) 418 F. 2d 226, 227-228; *Papilsky v. Berndt* (2d Cir. 1972) 466 F. 2d 251, 255, cert. den. 409 U. S. 1077; *Jensen v. Voyles* (10th Cir. 1968) 393 F. 2d 131, 133.)

Therefore, in light of the nature of petitioner's interest in ALCANCORP, petitioner cannot truly show any injury. Nor can petitioner show that the relief it seeks will correct the matter. Nor is an adjudication in this case necessary because ALCANCORP will be the best proponent of its own rights regarding the applicability to it of the unitary method of taxation. Finally, there is no obstacle to ALCANCORP asserting its rights before the California court. ALCANCORP can raise in the California court all of the defenses that petitioner seeks to raise here, including challenges to the constitutionality of the unitary method of taxation.

D. The Most Recent Decisions Of This Court Confirm That Petitioner Has No Standing

In the last few years there have been several major decisions involving the question of standing. However, in none of these cases has this Court expanded the standing doctrine to a person such as petitioner, who was in-

directly affected by some governmental action, or where the directly affected person had a remedy in the state courts, or where that person was actually litigating the identical issues against the same defendant in the state courts.

The doctrine of standing was succinctly summarized in *Simon v. Eastern Ky. Welfare Rights Org.* (1976) 426 U. S. 26 [48 L. Ed. 2d 450, 96 S. Ct. 1917]. This Court stated:

> "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. See *Flast v. Cohen*, 392 U. S. 83, 95, 88 S. Ct. 1942, 1950, 20 L. Ed. 2d 947, 959 (1968). The concept of standing is part of this limitation. Unlike other associated doctrines, for example, that which restrains federal courts from deciding political questions, standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.' *Id.*, at 99, 88 S. Ct., at 1952, 20 L. Ed. 2d at 961. As we reiterated last Term, the standing question in its Art. III aspect 'is whether the plaintiff has "alleged such a personal stake in the controversy" as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' *Warth v. Seldin*, 422 U. S. 490, 498-99, 95 S. Ct. 219, 2205, 45 L. Ed. 2d 343, 354 (1975) (emphasis in original). In sum when a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." (426 U. S. at pp. 37-38.)

Here not only is petitioner's purported injury speculative, there is absolutely no assurance of redress. Even if this Court should rule that the unitary tax as applied to ALCANCORP is unconstitutional, there is absolutely no assurance that ALCANCORP will declare a larger dividend to petitioner or that its value in the ALCANCORP stock will be enhanced. Moreover, in a concurring opinion, Justice Stewart expressed the applicable maxim of tax law in the following words:

> "I add only that I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else." (*Id.*, at p. 46.)

Then very recently in its decision in *Valley Forge College v. Americans United* (1982) — U. S. — [70 L. Ed. 2d 700], this Court reiterated the rule that "[t]he exercise of judicial power . . . is . . . restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the Court adjudicate." (*Id.* at p. 710.) This Court also made clear that "injury in fact" must consist of something more than the invasion of an "individuated right" or "personal constitutional right" to a governmental observance of the Constitution. Rejecting the notion that mere allegation of a legal right is sufficient to confer standing, the court stated ". . . assertion of a right to a particular kind of government conduct, which the government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." (*Id.*, at p. 717.)

Here, petitioner has not alleged any palpable injury in fact to itself. Petitioner has consistently claimed be-

fore the district court and the court of appeals that FTB's proposed assessment against ALCANCORP, if allowed to stand, will result in a diminution in value of its shareholding interest in ALCANCORP. Obviously, that allegation does not bestow standing upon petitioner.

II.

Petitioner's Interpretation of Japan Line Fails To Furnish It With Standing

Petitioner relies on *Japan Line, Ltd. v. County of Los Angeles* (1978) 441 U.S. 434, particularly as construed by this Court in *Container* to support its argument that it has standing on its own right. But petitioner's reading of *Japan Line* and *Container* is erroneous. With respect to double taxation, this Court's references to it in *Container* was to double taxation by California upon the corporation doing business in California and upon which the FTB imposed the tax. California clearly could not have taxed petitioner even once because it is not subject to California jurisdiction. Thus, if there was double taxation, then petitioner's California subsidiary, ALCANCORP, can readily litigate that issue before the California court in the latter's pending lawsuit. As a matter of fact, ALCANCORP has expressly raised the double taxation issue, the foreign commerce issue, as well as many, many others.

Furthermore, in *Container,* this Court has distinguished *Japan Line* in several ways. In this respect the Court said:

> "Nevertheless, there are also a number of ways in which this case is clearly distinguishable from *Japan*

Line. First, it involves a tax on income rather than a tax on property. . . . Second, the double taxation in this case, although real, is not the 'inevitabl[e]' result of the California taxing scheme. . . . The third difference between this case and *Japan Line* is that the tax here falls, not on foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States." (*Container*, 103 S. Ct. at 2952.)

This Court went on to unequivocally declare that "[I]f California's method of formula apportionment 'inevitably' led to double taxation, see *supra*, at 26-27, that might be reason enough to render it suspect. But since it does not . . . ." (*Id.*, at 2954.) Finally, this Court found that in the absence of Congressional and Executive Branch action, the foreign policy of the United States is not seriously threatened by California's use of the unitary business concept on a worldwide basis. (*Id.*, at 2956.)

Ironically on September 23, 1983, well before the date on which this petition was filed,[2] President Reagan decided not to file a petition for rehearing in *Container*. At the same time the President also decided to establish a working group, comprised of representatives from the federal and state governments and the multinational business community to study the states' use of the worldwide unitary method of taxation. In implementation of this decision, Secretary of Treasury Donald Regan has formed a working group which is now beginning to review the uni-

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[2]Although, petitioner did not file its petition until October 13, 1983, petitioner did not mention the most recent actions taken by the federal government with respect to the worldwide unitary taxation question.

tary method.[3] In any event, to date the federal government has not established any policy forbidding the states from using the unitary method on a worldwide basis. If anything, based on newspaper reports, the President apparently believes that "[F]ederal intervention in state tax matters is objectionable in principle."[4]

III.

Petitioner's Argument That Only A Foreign Parent Can Raise the Foreign Commerce Issue Is Without Any Support

Petitioner begins its argument with the totally unsubstantiated statement that "the economic impact of the tax is exactly the same on the Petitioner as it is on its domestic subsidiary." (Petn. for Cer., pp. 14-15.) Then petitioner speculates that the FTB will contend in the California state court in ALCANCORP's tax refund action that ALCANCORP cannot raise the foreign commerce issue. Petitioner further suggests that FTB should make certain arguments before the California state court. How absurd! There can be no doubt that the California court would consider the foreign commerce question in ALCANCORP's California lawsuit, particularly in light

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[3]See attached Appendix A, which consists of reproduced copies of Treasury News of September 30, 1983, telegram by Treasury Secretary Donald T. Regan, Treasury News of October 28, 1983 and Treasury Department's Notice of October 3, 1983.

[4]Sacramento Bee, September 14, 1983, at A13, col. 1.

of this Court's notes 26 and 32, 77 L. Ed. 2d at 568 and 572.

Any "Catch-22" situation (Petn. for Cert., p. 17) exists only in the mind of petitioner. Obviously, petitioner has made the "Catch-22" statement in a futile back-door effort to gain the attention of this Court since it has no legal bases for its position.

Finally, as far as the alleged question involving the congressional "intent" of the Tax Injunction Act is concerned, the subject was never presented to the courts below. In any event, petitioner's reliance on *Hillsborough v. Cromwell* (1946) 326 U. S. 620, and *California v. Grace Brethren Church* (1982) 457 U. S. 393, is erroneous as these cases involved taxpayer's remedies before the state courts. They are irrelevant here where the question is one of standing of a nontaxpayer.

CONCLUSION

In summary, petitioner has totally failed to establish that it has standing to sue. Petitioner also has not pointed to the existence of a single fact, as opposed to its conjective and speculative assertions, to demonstrate that the named defendants have violated petitioner's purported rights under the United States Constitution or laws. Nor has petitioner cited one case which supports its contention in effect that the FTB cannot assess a corporation

doing business in California, viz., ALCANCORP, under the unitary method. Thus, petitioner's action is totally devoid of merit, and the petition should be denied.

DATED: November 22, 1983.

Respectfully submitted,

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APPENDIX "A"

TREASURY NEWS

Department of the Treasury Washington, D. C.
Telephone 566-2041

For Immediate Release
Friday, September 30, 1983

Contact: Charles Powers
566-2041

STATEMENT BY TREASURY SECRETARY DONALD T. REGAN ON UNITARY TAXATION

Secretary of the Treasury Donald T. Regan has invited representatives of all groups involved in the states' use of the worldwide unitary method of taxation to a meeting at the Treasury Department on October 7, 1983.

The purpose of this *informal discussion* is to produce constructive ideas and suggestions *for the development of* the *offcial working group* on unitary taxation.

President Reagan last week asked the Treasury Secretary to establish and chair a high-level working group to explore and attempt to resolve the complex issues involved in the unitary method of taxation.

[List of invitees and telegram of invitation attached.]

OUTGOING TELEGRAM
Continuation Page

Last Words From Prior Page

Page Unclassification

President Reagan has asked me to establish a high-level working group to explore and attempt to resolve the com-

plex issues involved in the states' use of the worldwide unitary method of taxation. This group, which I will chair, will be composed of representatives of the federal government, state government, and the business community. Its mission is to develop as quickly as possible a federal policy conducive to harmonious international economic relations while respecting the fiscal rights and privileges of individual states, their need for revenues, as well as considering the views of our trading partners.

In order to explore the issues involved, I would like to invite you to attend a meeting on Friday, October 7, 1983, from 10:30 a.m.-12 noon in Room 4426 at the Treasury Department. It is my hope that this informal discussion, which will include representatives of all the groups involved, will produce constructive ideas and suggestions for an official working group on unitary taxation. A letter of confirmation follows.

Please contact Assistant Secretary of the Treasury Bruce Thompson at (202) 566-8191 regarding your acceptance and detailed arrangements.

Donald T. Regan

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TREASURY NEWS

Department of the Treasury Washington, D. C.
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For Immediate Release
October 28, 1983

Contact: Charles Powers
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Treasury Announces Membership of Worldwide Unitary Taxation Working Group

Secretary of the Treasury Donald T. Regan today announced the membership of the Worldwide Unitary Taxation Working Group. This group, composed of representatives of the federal government, state governments, and the business community, will advise the Treasury and assist in the development of a policy dealing with the complex issues involved in the states' use of the worldwide unitary method of taxation.

The first public meeting of the Working Group, which will be chaired by Secretary Regan, will be held on Wednesday, November 2, 1983, at 10:30 a.m. in the Cash Room of the Treasury Department. Charles E. McLure Jr., Deputy Assistant Secretary of the Treasury (Tax Analysis), will serve as the Group's Staff Director. The members of the Working Group are as follows:

Mr. John R. Opel
Chairman and Chief

The Honorable
James Thompson

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Governor of Illinois
Springfield, Illinois 61706

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The following federal government representatives will assist the Chairman:

The Honorable
John Chapoton
Assistant Secretary
(Tax Policy)
U. S. Treasury Department

The Honorable
W. Allen Wallis
Under Secretary for
Economic Affairs
Department of State

The Honorable
John A. Svahn
Assistant to the President
for Policy Development
The White House

Mr. Robert B. Hawkins, Jr.
Chairman
Advisory Commission on
Intergovernmental Relations
1822 21st Street
Sacramento, California 95814

DEPARTMENT OF THE TREASURY
Office of the Secretary

WORLDWIDE UNITARY TAXATION WORKING GROUP ESTABLISHMENT AND MEETING NOTICE

Pursuant to the Federal Advisory Committee Act (PL. 94-463) the Department of the Treasury announces the establishment and a meeting of the Worldwide Unitary Taxation Working Group.

The Working Group, composed of representatives of the Federal government, state governments, and the business community, will advise and assist in the development of a policy dealing with the comlex issues involved in the states' use of the worldwide unitary method of taxation. It is in the public interest that this tax issue affecting our

individual states and our trading partners be resolved in a fair and workable manner by a cooperative effort of the affected parties.

The Working Group will meet at *10:30 A. M.*, on November 2 in the Cash Room of the Main Treasury Building. The purpose of the meeting is to define the work plan and develop a time frame for deliberations. The agenda includes the following topics for discussion:

1. A consistent and appropriate definition of a unitary business.
2. The application of the three-factor formula in an international context, including its impact on international income flows.
3. Uniform rules and standards to alleviate administrative burdens while respecting state fiscal sovereignty.
4. An equitable resolution to the problems raised by foreign governments and foreign-based multinationals.
5. The treatment of intercorporate dividends.
6. Federal-state sharing of tax information, including transfer pricing adjustments.
7. Uniform reporting requirements and joint state audits.

Inquiries concerning the Working Group should be addressed to Charles McLure, Room 3108, Main Treasury, 15th & Penn., N. W., Washington, D. C. 20220, Telephone 566-2563.

/s/ John E. Chapoton
Assistant Secretary
(Tax Policy)

Dated: Oct. 2, 1983